

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>FIBERCOMM, L.C., FOREST CITY TELECOM, INC., HEART OF IOWA COMMUNICATIONS, INC., INDEPENDENT NETWORKS, L.C., AND LOST NATION-ELWOOD TELEPHONE COMPANY,</p> <p style="text-align:right">Complainants,</p> <p style="text-align:center">vs.</p> <p>AT&T COMMUNICATIONS OF THE MIDWEST, INC.,</p> <p style="text-align:right">Respondent.</p>	<p style="text-align:right">DOCKET NO. FCU-00-3</p>
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**ORDER DENYING COMPLAINANTS' REQUEST FOR STAY
AND REQUIRING TARIFFS**

(Issued April 26, 2002)

BACKGROUND

On October 25, 2001, the Utilities Board (Board) issued its "Final Decision and Order" in this docket, finding (among other things) that AT&T Communications of the Midwest, Inc. (AT&T), constructively ordered access services from certain competitive local exchange carriers¹ (CLECs) and that AT&T owes those CLECs for

¹ The Complaint was filed by FiberComm, L.C., Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Independent Networks, L.C., and Lost Nation-Elwood Telephone Company (Complainants).

the access services it ordered and used. The Board directed the CLECs to re-bill AT&T for past access services provided, at the access rates specified in the CLECs' then-effective access tariffs, through the date of the order. The Board also found the CLECs' then-existing access charges were unreasonable and ordered them to file new access tariffs with lower rates or, if they believed higher access charges continue to be appropriate, new access tariffs with carrier-specific cost support.

AT&T (and other parties) sought rehearing of the Board's order, and AT&T requested a stay of the final decision and order. The Board granted that request and stayed the effectiveness of its order while rehearing was pending. On January 25, 2002, the Board issued its order on rehearing, affirming the final decision and order and lifting the stay.

On February 22, 2002, AT&T filed a petition for judicial review of the Board's order in Polk County District Court.² On the same date, AT&T filed with the Board a motion for a stay of the Board's order pending conclusion of the judicial review proceedings. On April 10, 2002, the Board issued an order denying AT&T's motion.

Complainants' Motion For Clarification Or Stay

On April 3, 2002, the Complainants filed a motion for clarification of the Board's final decision and order or, in the alternative, for a stay of that order pending resolution of the judicial review proceedings. Complainants note that while the Board's final decision and order directed the CLECs to file new access tariffs with

² AT&T Communications of the Midwest, Inc., v. Iowa Utilities Board, Polk County District Court AA No. CV 3985.

lower rates, it did not specify a deadline for filing the new tariffs. Instead, it provided that the new rates would be effective from the date of the final decision and order, that is, October 25, 2001. Complainants ask the Board to clarify that an immediate tariff filing is not required by the Board and that the CLECs may therefore choose not to file new access tariffs while the judicial review proceedings are pending.

Complainants state they understand they will be required to file a tariff and make refunds if they are not successful on judicial review.

In the alternative, Complainants request a stay of the tariff-filing requirement, pending completion of judicial review. They assert that application of the four-factor test from Teleconnect Co. v. ISCC, 366 N.W.2d 511, 513 (Iowa 1985) and Iowa Code § 17A.19(5) (2001) supports their request. Those four factors can be summarized as follows:

1. Whether the applicant is likely to prevail on judicial review;
2. Whether the applicant will suffer irreparable injury if relief is not granted;
3. Whether granting relief to the applicant will substantially harm other parties to the proceedings; and
4. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Complainants argue their request satisfies all four factors. First, they assert a strong likelihood of success, based on the arguments identified in paragraphs 6 through 20 of their application for rehearing filed November 14, 2001.

Second, they assert they will suffer irreparable damage if they are required to reduce their access charges now, then prevail in the judicial review proceedings but cannot back-bill AT&T and the interexchange carriers for the lost revenue.

Third, Complainants argue there will not be any substantial harm to any other party if the stay is granted, because they will have to refund any over-collections if they are not successful in their appeal.

Finally, Complainants argue the public interest favors competition in the local exchange marketplace and the CLECs' ability to compete will be hampered if they are irreparably damaged in the manner described above.

On April 10, 2002, Laurens Municipal Broadband Communications Utility and Coon Rapids Municipal Communications Utility, two other CLECs that are parties to this docket, joined in the Complainants' motion.

AT&T's Opposition

On April 17, 2002, AT&T filed its opposition to the Complainants' motion for clarification or stay. AT&T argues that the Board's final decision and order clearly directs the CLECs to file new access tariffs containing new and lawful access charges and there is no language in the order to suggest that the Board's order is conditioned upon judicial review proceedings that had not been filed at the time the order was issued. AT&T concludes from this that the Complainants' proposed clarifications would contravene, rather than clarify, the terms of the order.

AT&T also opposes the Complainants' alternative application for a stay, arguing the four-factor test requires that the request be denied. First, AT&T argues

the Complainants have not shown any likelihood of success in their appeal, as the Board had jurisdiction to consider Complainants' access rates pursuant to Iowa Code §§ 476.3(1) and 476.11 and there is ample evidence in the record demonstrating that the CLECs' then-existing access rates were unlawful.

Second, AT&T argues the Complainants have not shown they will suffer irreparable injury in the absence of a stay. AT&T disagrees with the Complainants' argument that if they are not permitted to collect their higher access charges during the appeal and they ultimately prevail, they will be unable to recover the revenue they lost during the period of judicial review. Instead, AT&T argues, if the Complainants are successful on judicial review, the Board has the authority to undo what was wrongfully done by virtue of the Board's prior order. In other words, AT&T argues the Board has the authority to allow the CLECs to re-bill at their pre-October 25, 2001, access charge levels if the Complainants win, even if lower-rate tariffs have been filed and approved during the appeal. Thus, AT&T concludes, Complainants will not be irreparably harmed by denial of a stay.

Third, AT&T asserts that granting a stay will inflict serious harm on AT&T (and, presumably, other interexchange carriers), which would have to pay access rates the Board has determined to be unlawful for the entire time judicial review is pending. AT&T also argues it may be unable to recover any overpayments it would have to make during the appeal, because of the alleged uncertain financial condition of the Complainants.

Finally, AT&T argues the public interest, specifically Iowa's policy of competitive neutrality, demands that the stay request be denied. AT&T argues it would not be competitively neutral to require AT&T to pay unlawful access rates for a monopoly service and effectively subsidize the Complainants' competitive local exchange services.

ANALYSIS

Complainants' request for clarification

The Board will deny Complainants' request for clarification. The Board's final decision and order directed the CLECs to file new access charge tariffs within a reasonable time, but allowed the CLECs some flexibility to decide when to file, so long as the effective date of the new tariffs was October 25, 2001. However, it would not be reasonable to extend this flexibility to delaying the filing for a period of years, while judicial review is pending; it will be administratively easier and cleaner to either require that the new tariffs be filed or to clearly stay the filing date pending judicial review. Therefore, the Board will deny the motion for clarification and consider the motion for stay.

Complainants' motion for stay

In the Board's order in this docket denying AT&T's application for stay, the Board found it appropriate to consider three of the four factors from Teleconnect and § 17A.19(5), even though the Board is not explicitly bound by that test when ruling on an application for a stay. The Board gave very little, if any, weight to the first factor, the party's likelihood of success on the merits. The Board reasoned that an agency

would be unlikely to ever concede that a party is likely to prevail on judicial review, so if this factor were given significant weight, an agency would almost never exercise its authority under § 17A.19(5) and grant a stay. The Board found the other three factors to be more appropriate for agency consideration. The Board will consider those same three factors in ruling on the Complainants' motion for a stay.

First, Complainants have not shown they will suffer irreparable injury if they do not receive a stay. Complainants argue that if they are required to file and apply lower-rate access tariffs during the period of judicial review, and then prevail, they will be unable to re-bill the interexchange carriers at their higher access rates, resulting in irreparable harm. However, AT&T cites authorities indicating that in the circumstances described by the Complainants, the Board would have the authority to permit the CLECs to re-bill at their original access charge levels for the access services rendered while the appeal is pending. This ability to correct the potential shortfall means that the Complainants are not subject to "irreparable" harm. This factor does not weigh in favor of granting Complainants' motion for stay.

As to the next factor, AT&T alleges it will be substantially harmed if it is required to pay access charges the Board has determined to be unlawful while the judicial review proceedings are pending. The Complainants address this argument by asserting they would have to refund any over-collections if the stay is granted and they are not successful on appeal. AT&T responds it may be unable to collect refunds in those circumstances because of the alleged uncertain financial condition of the Complainants. (The Board notes that the documents relied upon by AT&T in

support of this latter claim do not show that the Complainants themselves are suffering financially; instead, they tend to show that some other CLECs are in financial straits, but make no reference to any of the Complainants.)

The Board finds that this factor weighs in favor of granting a stay; nothing in this record establishes that AT&T (and the other interexchange carriers) will be substantially harmed by a stay, so long as any over-collections are subject to a refund obligation. This does not mean a stay *should* be granted; it only means that, as far as this factor is concerned, a stay *could* be granted.

The final factor, the public interest, is the most important one in the Board's consideration. The Complainants allege that denying a stay would cause them irreparable harm and therefore be contrary to the public interest in promoting competition in the telecommunications marketplace. However, as previously indicated, the Board finds that the Complainants will not be irreparably harmed by denial of a stay, so the premise of their public interest argument is in error.

The Board finds that the public interest will best be served by application of lawful access charges at the earliest opportunity, in order to promote fair local exchange competition, subject to the Board's ability to correct any appeal-related over- or under-collections after the judicial review proceedings are concluded. Accordingly, the Board finds that the third factor, the public interest, weighs against granting a stay.

In the end, two of the three relevant factors weigh against issuance of a stay, including the most important factor, the public interest. The Board will deny

Complainants' motion for a stay pending judicial review and direct the CLEC parties to this proceeding to file compliance tariffs within 45 days of the date of this order.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Complainants request for clarification or a stay of the Board's October 25, 2001, "Final Decision And Order" while judicial review proceedings are pending is denied.
2. All CLEC parties to this proceeding are directed to file, within 45 days of the date of this order, proposed access tariffs complying with the requirements of the Board's "Final Decision and Order and Order On Rehearing."

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 26th day of April, 2002.